



LEGAL ALERT

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Kory A. Langhofer
602.382.6053
klanghofer@swlaw.com
vCard



Craig R. McPike
602.382.6538
cmcpike@swlaw.com
vCard



Michael T. Liburdi
602.382.6170
mliburdi@swlaw.com
vCard

Arizona Will Audit Certain Organizations Engaging in Political Activism

by Kory A. Langhofer, Craig R. McPike and Michael T. Liburdi

Last week, the Arizona Secretary of State's office announced that it will begin auditing statewide and legislative "independent expenditure committees," that engage in political activism without registering as political action committees ("PACs"). If the Arizona Secretary of State determines there is reasonable cause to believe an organization improperly failed to register as a PAC, it will refer the matter to the Arizona Attorney General for enforcement.

Arizona law generally requires an organization to register as a PAC if its "primary" purpose is to influence elections. In identifying an organization's primary purpose, authorities consider all the facts and circumstances rather than fixating on any one factor. Authorities consider, for example, the percentage of expenditures devoted to political advertising, the topics discussed at organizational meetings, the amount of time and attention the organization invests in non-political activities and the goals listed in the organization's founding documents. No one factor, taken alone, determines whether an organization is required to register.

If an organization is required, but fails, to register as a PAC, the consequences can be severe. State

authorities can fine the organization up to three times the value of its pre-registration income and the Internal Revenue Service may impose back taxes and fines on the organization's pre-registration income. If an individual or the organization intentionally avoids PAC registration and/or payment of taxes, they may be prosecuted criminally.

Despite the serious consequences for failing to register as a PAC, most organizations engaging in political speech do not register. For most unregistered organizations that engage in political speech (for-profit corporations, for example), registration is clearly not required because political activism is not the organization's "primary" purpose. For many other organizations engaging in political speech (non-profit policy and social welfare groups, for example), political activism is very closely tied to organizational goals and objectives—but such groups commonly choose not to register as PACs because the law requires registered PACs to (a) limit their involvement in certain important activities, such as lobbying; (b) devote significant resources to preparing and filing financial reports and (c) publicly identify their sources of income, which often deters donors who for social, business or political reasons do not wish to be publicly and permanently identified as sponsoring an organization that at times takes controversial positions.

From the government's perspective, registration as a PAC and the financial disclosures that registered PACs must make on a regular basis help prevent political corruption and assist voters in assessing an organization's credibility and/or bias. This view, which is very widely held by state, federal and local elections regulators, appears to be motivating the Arizona Secretary of State's audit plans.

An organization targeted by the audits could face ruinous consequences if, after investigation, the government concludes that the organization improperly failed to register as a PAC. To avoid such consequences, an organization may be able to advance a number of legal defenses, depending on the circumstances, such as the following:

- **Lack of Jurisdiction.**

Targeted organizations may be able to challenge the authority of the Arizona Secretary of State to conduct the audits. Arizona statutes generally

entrust election law investigations to the Arizona Attorney General, not the Arizona Secretary of State; and, so far, the Arizona Attorney General has not indicated whether his office plans to participate in the audits.

- **Sufficiency of the Evidence.**

Because so many factors must be taken into account in identifying an organization's primary purpose, an organization may be able to argue that, notwithstanding certain evidence consistent with the applicability of the PAC registration requirements, there is not "a preponderance of evidence" to establish a violation of the PAC registration requirements.

- **Unconstitutional Vagueness.**

Because the First Amendment protects political activism, the government cannot punish individuals or organizations for conduct related to political activism unless, before such conduct occurs, the government provided clear notice that the conduct was illegal and could be punished. So, even if the Arizona Secretary of State determines that an organization improperly failed to register as a PAC, the organization may be able to avoid fines and sanctions by arguing that the law defining its "primary" purpose and the registration requirement were insufficiently clear and do not support penalties for any conduct occurring before such determination.

- **Selective Enforcement.**

The U.S. Constitution prohibits the government from singling out for political reasons any particular individual or group when enforcing the law. Although the Arizona Secretary of State has initially indicated that it will conduct audits on a random basis, any defects in its process for random selection may bar subsequent enforcement actions.

If you have any questions about the content of this legal alert, you may contact the author or another Snell & Wilmer attorney by email or by calling 602.382.6000.

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Snell & Wilmer L.L.P. | One Arizona Center | 400 East Van Buren Street | Suite 1900 | Phoenix, Arizona 85004
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